


CITY OF SANTA BARBARA

INTEROFFICE MEMORANDUM

TO: Council Subcommittee on Homelessness and Community Relations
FROM: Stephen P. Wiley, City Attorney 
DATE: Thursday, September 11, 2008
SUBJECT: Panhandling Ordinances and Relevant Constitutional Considerations

This memorandum is intended to provide the Council subcommittee with some information on existing City ordinances and state laws which regulate panhandling and to briefly summarize the current state of constitutional law regarding ordinances and statutes which limit panhandling or begging in public places. It is hoped that this information may assist the Committee in its consideration of certain proposals that the City should act in certain ways to further limit panhandling, particularly in the central business district area along State Street. [Please note, however, that this memorandum does not directly address some of the other negative public impacts often associated other transient behaviors within the City's CBD or discuss the legalities of the proposed solutions intended to deal with those behaviors.]

I. Existing City Ordinances Regulating Solicitations and Related Street Behaviors. An appropriate starting point for a good discussion of possible new City regulations to further limit panhandling or begging or other forms of solicitation is to fully understand the existing Municipal Code ordinances already regulating these actions. Currently, the following City ordinances are in place and are being actively enforced, both by the Police Department and the City Attorney's office:

A. SBMC Chapter 9.50 "Prohibition on Aggressive Soliciting." This ordinance, as enacted by the City Council in 1992, prohibits panhandling where the panhandling involves any action to "intentionally **coerce, threaten, hound, or intimidate** another person for the purposes of soliciting alms." The verbs "coerce, threaten, hound, or intimidate" are specifically defined in Chapter 9.50 to include the following types of conduct:

- a. any conduct which would cause a reasonable person to fear for his or her safety;
- b. any conduct which intentionally blocks the path of the person being solicited;
- c. any conduct which persists in following the person being solicited while the solicitor continues to demand money after the person being solicited has said no or otherwise indicated a desire to not give money.

A complete copy of SBMC Chapter 9.50 is attached as Exhibit 1.

B. SBMC Chapter 9.98 "Pedestrians Blocking Public Sidewalks." This City ordinance dates from 1966 in its most recent iteration; it prohibits any person from "standing or sitting upon any street, sidewalk or crosswalk in the City in any manner so as to hinder or obstruct the free passage of pedestrians thereon, or to annoy or molest pedestrians." SBMC Chapter 9.98 ordinance is very similar to state Penal Code section 647c which states as follows:

"Every person who willfully and maliciously obstructs the free movement of any person on any street, sidewalk, or other public place or on or in a place open to the public is guilty of a misdemeanor."

Since it is qualified by the words "willfully and maliciously," Penal Code section 647c has long been interpreted by the courts as a "specific intent" crime. In other words, before a valid conviction for §647c may occur, the courts require direct proof that the person accused of the obstruction fully realized that he or she was were actually blocking someone from passing by on the sidewalk. This has resulted in an evidentiary requirement that the citing police officer witness the actual obstruction occurring – i.e., that, before issuing a citation, the officer see a member of the public who was blocked and who then who was forced to walk around (or over) the person "sitting or standing" on the sidewalk. In effect, under Penal Code section 647c (or SBMC section 9.98.010) it is typically legally insufficient for an officer to issue a citation based only on the possibility that someone might have been or might be obstructed or hindered on the sidewalk. As a practical matter, this requirement substantially limits the use of both Penal Code section 647c and SBMC Chapter 9.98 as strict enforcement tools aimed at minimizing the number people who use their bodies or their possessions to apparently obstruct people using a sidewalk so that they then have an opportunity to solicit or beg from them. This ordinance is attached as Exhibit 3.

C. SBMC Chapter 9.97 "Sitting or Lying on Sidewalks and Paseo Along Certain Downtown Portions of State Street." This ordinance was enacted by the City Council in 1997 after the federal 9th Circuit Court of Appeal constitutionally validated a virtually identical ordinance enacted by the city of Seattle. This ordinance prohibits all persons from "sitting or lying down on a public sidewalk or public paseo or upon a blanket, chair, stool or any other object placed upon a public sidewalk or public paseo" during the hours of 7:00 a.m. and 9:00 p.m. within the first 13 blocks of State Street. Chapter 9.97 provides that no one will be cited for violating this ordinance unless they are first warned that their actions are prohibited. It does not apply to benches or walls supplied for the purpose of providing a place for a member of the public to sit down. In enacting this ordinance and to minimize any possible legal challenge, the City Council chose to closely follow the Seattle model which was validated by the 9th Circuit, especially by defining a narrow and limited scope (i.e., the first 12 blocks of State Street) such as that used by the Seattle ordinance and incorporating the prior warning requirement. However, in doing so, the City was required to also limit the scope our ordinance to the major pedestrian thoroughfare within our central business district – i.e., to State Street. A copy of SBMC Chapter is attached hereto as Exhibit 3.

D. Miscellaneous Related City Ordinances. The City also have several Municipal Code provisions which are typically often useful and used in controlling the adverse and improper

behaviors of some transients. For example, SBMC Chapter 9.68 ("Injuring or Interfering with Property") is often applied to cite persons who are damaging City-owned landscaping by lying or sitting in such landscaping. It also contains a provision (§9.68.060) which makes it unlawful to enter into or remain in a City parking structure or parking lot except for the purposes of parking or retrieving a vehicle. This provision is often used to cite individuals who are panhandling in a City parking lot or parking structure. In addition, SBMC Chapter 9.60 imposes certain closing times on City buildings and facilities, including the exterior portions of the buildings such as the porches, parking lot, and landscaped areas of City Hall or the Community Development/Public Works buildings. [A copy of SBMC Chapter 9.68 is attached as Exhibit 4.]

The City's "Labor Line" ordinance (SBMC Chapter 9.140) also applies to more than solicitations for work. It prohibits anyone from entering a City street right of way for the purposes of soliciting or begging good or money from an individual in a vehicle unless the vehicle is legally stopped or parked. [Copy attached as Exhibit 5.]

Finally, Chapter 9.48 of the Municipal Code broadly prohibits any person from "selling, vending, or offering for sale" any goods while located within a City street or on a City sidewalk or within City parking lot or other City owned real property. [Copy attached as Exhibit 6.]

II. Constitutional Considerations Applicable to "Panhandling" or "Begging." Begging or panhandling¹ (or "soliciting alms") is definitely considered a form of free speech deserving of some constitutional protection under both the First Amendment to the U.S. Constitution and Article I, section 2(a) of the state Constitution – i.e., the comparable "free speech" provisions of California's constitution. At the same time, municipal ordinances or state laws restricting the soliciting of an immediate donation of money (i.e., begging) have generally been deemed to be "content neutral" and, as a result, some limits on "begging" are constitutionally permissible in some limited situations.

In practical effect, this means that municipal ordinances restricting begging can be constitutionally justified under appropriate circumstances so long as the ordinance is fundamentally without reference to the content of the regulated speech – aside from the fact that the "speech" begs or solicits money. However, because "free speech" is being regulated these types of regulations are viewed by the courts as "inherently intrusive and [of a] potentially coercive nature." As a result, in constitutional "First Amendment" terms, such ordinances are subject to "strict scrutiny" by the courts. Ultimately, before a court will find a typical municipal "begging" ordinance constitutional, it must first determine that the ordinance is precisely and carefully worded in a non-vague and non-ambiguous manner to restrict only potentially negative conduct or situations – but not to restrict mere speech. Further, once a court has determined that the ordinance is properly limited to regulating improper conduct only, it must then find that the ordinance is also narrowly tailored to support a "substantial governmental interest" in a way which appears to be a reasonable "time, place and manner" restriction of speech which leaves open ample other opportunities for a permissible type of this sort of speech. See *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 93 Cal.Rptr.2d 1, wherein the

¹ The state Penal Code (for example) defines unlawful "begging" as follows: Every person "who accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms." Penal Code Section 647(c).

California supreme court concluded that the same constitutional standards apply under the state and federal Constitutions, despite different "free speech" clauses in each constitution.

As a result, several generalizations may be made about what is "constitutional" in this context. For example, it is clear that it is probably not permissible to adopt a regulation that attempts to prohibit solicitations for money for the requestor's own use while allowing on-street solicitations by non-profit organizations. *Perry v. Los Angeles Police Department*, 121 F.3d 1365 (9th Cir. 1997) In *Perry*, a Los Angeles city ordinance provided "No person shall hawk, peddle, or vend any goods, wares or merchandise, or beg or solicit alms or donations upon" any public way in a specified area including the area known as the Venice Beach boardwalk. There was an exception for the solicitation of donations by a non-profit organization. The court invalidated the ordinance on the basis that there is no justification for allowing those with membership in (or association with) a nonprofit organization to sell items and solicit donations, while disallowing those acting on their own behalf from engaging in the same activities.

Courts upholding restrictions have stressed that what is being prohibited are requests for the immediate payment of money rather than other conduct or kinds of speech. (See *Los Angeles Alliance for Survival v. City of Los Angeles*, *supra*, for example.) Some courts have found it significant that while verbal solicitations were prohibited the use of signs to request funds was allowed. (See, *Berger v. City of Seattle* and *Gresham v. Peterson*.) Courts may be more receptive to restrictions in areas where there is a "captive audience" (such as on municipal transit, including possibly, at a bus stop) rather than those that apply in a typical sidewalk situation. (See, *Douchette v. City of Santa Monica* and *Gresham v. Peterson*.) A prohibition on soliciting for money in the downtown area or certain blocks on a designated street might be upheld on the basis it promoted tourism and the economic welfare of business in addition to protecting persons from intrusive behavior. However, the law is not clear and different judges may reach opposite conclusions concerning the validity of such a restriction. (Compare *Smith v. City of Fort Lauderdale* and *One World One Family Now v. City and County of Honolulu* with *ACLU v. City of Las Vegas*, as discussed below)

Penal Code section 647, subdivision (c) provides that a person "who accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms" is guilty of disorderly conduct, a misdemeanor. This provision has been upheld upon finding it regulated activity (i.e., the act of "accosting" someone) not speech. *Ulmer v. Municipal Court* (1976) 55 Cal.App.3d 263, 127 Cal.Rptr. 445. However, given that later cases have found begging to be a constitutional form of free speech the continuing validity of the *Ulmer* conclusion is now subject to question and given that the section bans the activity in **any** public place or place open to the public, it is not clear that Penal Code Section 647(c) leaves ample alternative channels of communication open to the public.

In *Loper v. New York Police Department*, 999 F.2d 699 (2nd Cir. 1993) the federal Second District Court of Appeal held that a municipal statute which prohibiting loitering, remaining or wandering about in a public place for the purpose of begging [i.e., very similar to Section 647(c)] violated the First Amendment. The court of appeal concluded that the statute was not narrowly tailored in that it did not leave alternative channels for communication.

In *Douchette v. City of Santa Monica*, 955 F.Supp. 1192 (C.D.CA. 1997) the federal district court judge, Judge Keller, upheld an ordinance regulating solicitations. Solicitation was defined as a request made in person seeking an immediate donation of money or other items of value. The ordinance prohibited "abusive" solicitation anywhere in the City and also contained "place" restrictions. It prohibited solicitation in the following locations: "(a) Bus stops; (b) Public transportation vehicles or facilities; (c) A vehicle on public streets or alleyways; (d) Public parking lots or structures; (e) Outdoor dining areas or restaurants or other dining establishments serving food for immediate consumption; (f) Within fifty feet of an automated teller machine; or (g) A queue of five or more persons waiting to gain admission to a place or vehicle, or waiting to purchase an item or admission ticket." The court reasoned that the ordinance provisions were content neutral in that "they apply evenhandedly to every organization or individual, regardless of viewpoint, which would desire to solicit contributions." The restrictions were narrowly tailored to serve a significant public interest. The restriction regarding vehicles was justified by traffic and safety concerns. As to the other restrictions, Judge Keller reasoned:

"In this case, the places to be regulated, although likely to be a public fora in some instances, share a common characteristic: they are places where people may well have a greater susceptibility to intimidation and harassment than in the open streets or sidewalks. A citizen approached by a solicitor on the street or on a sidewalk may simply decline the solicitation and walk away; by contrast, one eating outside, standing in line for a ticket, waiting for a bus, or proceeding through a parking garage is less likely to be able to move away with ease. The restriction on solicitation within 50 feet of an automated teller machine is also narrowly tailored, as citizens may justifiably feel anxious about being asked for money in these areas."

In *Smith v. City of Fort Lauderdale*, 177 F.3d 954 (11th Cir. 1999) the federal Eleventh Circuit upheld a city regulation which prohibited soliciting, begging or panhandling on a five mile strip of beach, on a one-and-a-half-mile promenade sidewalk between that beach and Highway A1A, and on the commercial-area sidewalk on the opposite side of that highway. The plaintiffs conceded that the regulation was content neutral and left open ample alternative channels of communication. The court held:

"Rule 7.5(c)'s restrictions on begging in the Fort Lauderdale area are narrowly tailored to serve the City's interest in providing a safe, pleasant environment and eliminating nuisance activity on the beach. The City has made the discretionary determination that begging in this designated, limited beach area adversely impacts tourism. Without second-guessing that judgment, which lies well within the City's discretion, we cannot conclude that banning begging in this limited beach area burdens "substantially more speech than is necessary to further the government's legitimate interest."

In *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000) the federal court upheld an Indianapolis ordinance regulating panhandling. The ordinance defined panhandling to cover requests for an immediate donation of money. The definition excluded passively standing or sitting or performing music or other street performance with a sign indicating a donation is sought, but without any vocal request. It prohibited aggressive panhandling. It also prohibited panhandling,

as defined, at night, at a bus stop, in any public transportation vehicle or public transportation, in a vehicle which is parked or stopped on a public street, in a sidewalk café, or within 20 feet of an ATM or bank entrance. The court stated:

“The city determined that vocal requests for money create a threatening environment or at least a nuisance for some citizens. Rather than ban all panhandling, however, the city chose to restrict it only in those circumstances where it is considered especially unwanted or bothersome - at night, around banks and sidewalk cafes, and so forth. These represent situations in which people most likely would feel a heightened sense of fear or alarm, or might wish especially to be left alone. By limiting the ordinance’s restrictions to only those certain times and places where citizens naturally would feel most insecure in their surroundings, the city has effectively narrowed the application of the law to what is necessary to promote its legitimate interest.”

The court went on to find that there were ample alternatives, noting that although plaintiff contended that soliciting a night was vital to his survival he could do night time soliciting by holding up a sign asking for donations.

In *Roulette v. City of Seattle*, 850 F.Supp. 1442 (W.D. Wa. 1994). An ordinance made it criminal “to beg with the intent to intimidate another person into giving money or goods.” It defined “intimidate” to mean “to engage in conduct which would make a reasonable person fearful or feel compelled.” The court construed the ordinance only to cover threats unprotected by the First Amendment. The court construed the word “intimidate” to be limited to conduct which threatens the person solicited and to threats which would make a reasonable person fearful of harm to his or her person or property. Since that conduct does not constitute free speech it was unnecessary to determine if it could be upheld as a reasonable time, place and manner restriction.

In *ACLU v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006) the court invalidated a soliciting ordinance. The city was attempting to create a pedestrian friendly zone in a five block area in the old part of downtown which was seen as having become sleazy and unsafe. The ordinance prohibited soliciting in the area and defined solicitation as “to ask, beg, solicit, or plead, whether orally, or in a written or printed manner, for the purpose of obtaining money, charity, business or patronage, gifts or items of value for oneself or another person or organization.” The court found that the restriction was content based – it not only banned the act of solicitation but also messages containing soliciting content. In other words it banned asking people to send money later as well as giving now. On this basis the case is distinguishable from restrictions that only ban the asking for the immediate payment of money. However, in footnote 13, the court stated that even if the ordinance were content neutral it was not narrowly tailored to further the City’s legitimate interest. “The record indicates that aggressive pan-handling, solicitation, and hand billing were the problems confronted by the City. Yet the solicitation ordinance targets a substantial amount of constitutionally protected speech that is not the source of the “evils” it purports to combat.” Does this indicate that to pass constitutional muster in the Ninth Circuit the ordinance must be limited to prohibiting “aggressive” conduct?

Berger v. City of Seattle, 512 F.3d 582 (9th Cir. 2008) involved a challenge to a variety of regulations of street performers in a downtown area (at the “Seattle Center.”) One of the

regulations provided that "no performer shall actively solicit donations, for example by live or recorded word of mouth, gesture, mechanical devices, or second parties, but allows performers to seek donations passively in an instrument case or other receptacle provided for that purpose by the performer, which may include a written sign that informs the public that such donations are sought." The court rejected the contention that the rule was not narrowly tailored because it was not limited to aggressive soliciting. The rule was narrowly tailored to the city's significant interest in promoting the Center's patrons from disruptive and unwanted advances.

In *United States v. Kokinda*, 497 U.S. 720, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990), the United States Supreme Court upheld the validity of a post office regulation that prohibited the solicitation of contributions on a sidewalk that went from the parking lot to the post office building. The defendants were convicted to setting up a table on the sidewalk and seeking donations to the Democratic Party. Four justices upheld the application of the regulation on the basis that the sidewalk in question was not a public forum. Justice Kennedy provided the fifth vote to uphold the ban. He thought that the sidewalk in question was a public forum indistinguishable from the typical public sidewalk. He stressed that the regulation only banned personal solicitations for the immediate payment of money.

In *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) the Supreme Court upheld a ban on soliciting for money inside an airport terminal but invalidated a ban on distribution of literature. A majority of the court held that the terminal was not a public forum. As in the *Korinda* case Justice Kennedy upheld the soliciting ban even though he considered the area to be a public forum.

Heffron v. International Society for Krishna Consciousness, Inc., 425 U.S. 640, 101 S.Ct. 2559 (1981). The Supreme Court upheld a prohibition at the state fair on distributing and selling literature or seeking contributions unless the organization had rented a designated space. The court upheld the regulation although four justices dissented as to the distribution of literature restriction. The court distinguished between a state fair and the typical sidewalk.

One World One Family Now v. City and County of Honolulu, 76 F.3d 1009 (9th Cir. 1996) is not a solicitation case but rather involved the validity of an ordinance that prohibited sales of "all goods, wares, merchandise, foodstuffs, refreshment or other kinds of property upon the public streets, alleys, sidewalks, malls, parks, beaches and other public places in Waikiki." Plaintiff was a non-profit corporation that wanted to engage in conduct banned under the ordinance by selling T-shirts imprinted with its philosophical and inspirational messages. That activity was protected by the First Amendment. The Ninth Circuit Court of Appeal (the circuit court with jurisdiction over California) upheld the ordinance as a valid time, place and manner restriction. It was content neutral because it was justified without reference to the content of the regulated speech. Its purposes were maintaining the aesthetic attractiveness of the area, promoting public safety and the orderly movement of pedestrians, and protecting the local merchant economy. It was narrowly tailored to meet those interests since it targeted the activity causing the problems it sought to ameliorate and didn't include expressive activity that didn't contribute to the problem. Ample alternative channels were available; the plaintiff could hand out literature and solicit donations on Waikiki sidewalks, and could sell its goods in stores.

ACORN v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986). A city ordinance provided "No person shall stand on a street or highway and solicit, or attempt to solicit, employment, business or contributions from the occupants of any vehicle." Members of ACORN would step into a street when a vehicle was stopped at a red light and ask the occupants for a contribution to their cause. The court assumed that the activities occurred within a public forum and concluded that the ordinance was a valid time, place and manner regulation. The Ninth Circuit recognized the city's interest in orderly flow of traffic and agreed there is a substantial risk of disruption in crowd or traffic control that may be presented by solicitation of contributions.

As mentioned earlier, in *Perry v. Los Angeles Police Department*, 121 F.3d 1365 (9th Cir. 1997) a Los Angeles city ordinance provided "No person shall hawk, peddle, or vend any goods, wares or merchandise, or beg or solicit alms or donations upon" any public way in a specified area including the area known as the Venice Beach boardwalk. There was an exception for the solicitation of donations by a non-profit organization. The court invalidated the ordinance on the basis that there is no justification for allowing those with membership in a nonprofit organization to sell items and solicit donations, while disallowing those acting on their own behalf from engaging in the same activities.